

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	No. 63229-9-I
	)	consolidated with
Respondent,	)	No. 63681-2-I
	)	
v.	)	
	)	
MICHAEL RYTHER and	)	UNPUBLISHED OPINION
CLIFFORD BARKHOFF,	)	
	)	FILED: March 15, 2010
Appellants.	)	
	)	

PER CURIAM — In these consolidated appeals, Michael Ryther and Clifford Barkhoff appeal the judgments and sentences entered following their conviction by a jury of robbery in the first degree, burglary in the first degree, taking a motor vehicle without permission in the second degree, theft in the second degree, and unlawful imprisonment, all with deadly weapon enhancements. Ryther was also convicted of kidnapping in the second degree. Ryther and Barkhoff have raised multiple issues, but the issue of jury deliberations is dispositive of this appeal.

On December 17, 2008, the jury deliberated for a few hours and then ended for the day.<sup>1</sup> The following morning, a snowstorm prevented one juror from making it to

---

<sup>1</sup> The parties agree on the stated facts.

court. The trial court contacted the alternate juror, who came in and joined the other jurors as they resumed deliberations. The record indicates that the trial court did not notify the parties before replacing a juror with the alternate and did not conduct any inquiry of the alternate juror on the record. In addition, the clerk's minutes indicate that the court did not instruct the reconstituted jury on the record to disregard all previous deliberations and to begin deliberations anew. In the afternoon, the court informed the parties of the substitution. At the same time, the court informed the parties that the jury had reached verdicts on the underlying offenses, but was unable to reach verdicts on the deadly weapon enhancements. The court declared a mistrial as to the enhancements and took the jury's verdicts on the underlying offenses. The jury found Ryther and Barkhoff guilty as on each charged offense. Ryther and Barkhoff were sentenced within the standard range.

Both Ryther and Barkhoff appeal. They contend that under State v. Stanley, 120 Wn. App. 312, 85 P.3d 395 (2004) and State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993), even where there is a good reason to replace a deliberating juror with an alternate, it is error to do so without notice to the parties and without instructing the reconstituted jury *on the record* that it must disregard all prior deliberations and begin anew. The issue is a manifest error that may be raised for the first time on appeal, and it is the State's burden to prove that the error was harmless beyond a reasonable doubt. Stanley, 120 Wn. App. at 316; Ashcraft, 71 Wn. App. at 464-65.

The State concedes that under Stanley and Ashcraft, the error here requires reversal and remand for a new trial. The concession is well taken.

Reversed and remanded.

FOR THE COURT:

Dwyer, A.C.J.

Edmonton, J.

Leach, J.